In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 195

BLANCHE A. HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM SUGGESTING THAT THE ABOVE-ENTITLED CAUSE HAS BECOME MOOT

The Solicitor General respectfully suggests to the Court that this cause has become moot.

On February 8, 1950, a grand jury which had been empanelled in the District Court for the Western District of Missouri on March 14, 1949 (R. 5–6), filed a presentment in civil contempt with the court charging that petitioner, a witness duly summoned and sworn before the grand jury, was contumaciously obstructing its investigation by giving obstructive, evasive, and perjurious answers to questions propounded to her. The grand jury prayed that the court use its coercive power to compel her truthfully to answer such

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questions without evasion or subterfuge. (R. 6–12.) After a hearing, the court found that she was deliberately obstructing the grand jury's investigation and on February 14, 1950, ordered that she be committed to the custody of the Marshal to be "held until said respondent requests to be returned to the said Grand Jury and truthfully tell the Grand Jury where or from whom she acquired this seventeen or eighteen thousand dollars which she falsely testified before the Grand Jury she received from Jack Gregory or until further order of this Court" (R. 15–17). The District Court denied petitioner's motion for a stay of execution of the order of commitment pending appeal (R. 26–27), but on March 10, 1950, the Court of Appeals granted her application for bail upon the posting of a bond (R. 135). On June 16, 1950, the Court of Appeals affirmed the order of the District Court (R. 152–153). In view of the fact, as the court below pointed out (R. 149), that the grand jury's term of service could not extend beyond September 14, 1950 (Rule 6 (g), F. R. Crim. P.[1]) and that the District Court's order would therefore "have to be enforced promptly" "to serve any useful purpose," the court vacated its prior order admitting petitioner to bail, directed that its mandate issue

[1] "A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. * * *" As we have pointed out above, the grand jury involved in this proceeding was empanelled on March 14, 1949.

forthwith (R. 151, 153), and in its judgment ordered that petitioner "surrender herself forthwith to the United States Marshal" (R. 152–153). Thereafter, on July 7, 1950, the further enforcement of the District Court's order was stayed by order of Mr. Justice Black conditioned upon the posting of a bond and upon the filing by July 16, 1950, of a petition for a writ of certiorari to review the judgment of the Court of Appeals (see Pet. 5).

This was a civil, not a criminal, contempt proceeding (R. 6, 15, 133). See, e. g., *United States* v. *Mine Workers,* 330 U. S. 258, 303–304; *Alexander* v. *United States,* 173 F. 2d 865, 866–867 (C. A. 9). The grand jury was discharged by an order entered on September 12, 1950, certified copies of which have been supplied us by the United States Attorney. It is therefore no longer possible for petitioner to comply with the order of the District Court, even if she should desire to do so. Consequently, the cause is clearly moot. See *Marshall* v. *Gordon,* 243 U. S. 521, 542; *Anderson* v. *Dunn,* 6 Wheat, 204, 231; *Securities and Exchange Commission* v. *Penfield Co.,* 157 F. 2d 65, 67 (C. A. 9), affirmed, 330 U. S. 585; *Parker* v. *United States,* 153 F. 2d 66, 70 (C. A. 1); *Loubriel* v. *United States,* 9 F. 2d 807, 809 (C. A. 2); *United States* v. *Collins,* 146 Fed. 553, 554 (D. Ore.). See also pp. 5–6, 14 of our Memorandum in Nos. 635–640, O. T. 1949, *Jane Rogers et al.* v. *United States,* suggesting denial

of the petition for writs of certiorari as to the petitioners Bary, Kleinbord, and Tracy Roy Rogers on the ground that the orders committing them for civil contempt had become moot with the expiration of the maximum term of the grand jury. Certiorari was denied as to those three petitioners on May 15, 1950. 339 U. S. 958.

For the reason stated, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 195.

BLANCHE A. HOWARD, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND SUPPORTING BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

BLANCHE A. HOWARD, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the United States:

Blanche A. Howard, a citizen of the United States and petitioner in the above entitled matter, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered June 16, 1950, one judge dissenting (R. 138-153), affirming the judgment of the District Court of the United States for the Western Division of the Western District of Missouri, entered February 14, 1950 (R. 15-17), convicting petitioner of civil contempt under 18 USCA 401 (3) and committing her to the custody of the United States Marshal until she requested to be returned to the Grand Jury and truthfully testify, *i. e.*, in contradiction to alleged false testimony previously given by her.

I. Summary Statement of Matters Involved.

This was a proceeding to hold petitioner in contempt before Honorable Richard M. Duncan, Judge of said United States District Court and to invoke the coercive power of

said court to compel petitioner to truthfully answer certain questions propounded to her, as to which questions it was alleged petitioner had previously testified falsely. The testimony was with reference to the person from whom she received a sum of between $17,000.00 and $18,000.00, allegedly deposited in petitioner's bank accounts during the years 1944 to 1949, inclusive.

The presentment (R. 6-12), filed February 8, 1950, alleged that petitioner gave the false testimony as aforesaid and that she was a contumacious, perjurious and evasive witness before a Grand Jury then in session in said District Court. Petitioner's answer (R. 13-15) denied that she was or intended to be contumacious, evasive or obstructive; it alleged that she answered the questions propounded to her truthfully, as accurately as her recollection would then permit and alleged that her said testimony was not reasonably susceptible of the construction charged, *i. e.*, that *all* of the money given her by Jack Gregory was deposited in her bank accounts, the latter allegation having reference to her testimony that she spent some of said money (R. 79) and her interrupted answer (R. 57) that Gregory would borrow some of it back.

The government's evidence consisted wholly of a transcript of petitioner's testimony before the Grand Jury[1] and of exhibits. The exhibits consisted largely of copies of bank records and newspaper clippings.[2]

There was no evidence tending to prove that any part of petitioner's testimony before the Grand Jury was false. The Court of Appeals ruled that:

> "The issue for determination at the hearing on the presentment was whether her testimony as a whole

[1]The transcript of her testimony is not readily discernible in the printed record. It begins with line ten (10) on page 41 and ends with line five (5) on page 93.

[2]The Court of Appeals excused petitioner from reproducing said exhibits in the printed record (R. 135-136). They are reproduced in the typewritten transcript of the record in the District Court, which has been transmitted to and filed with the clerk of this court.

before the Grand Jury, as disclosed by the reporter's transcript, was so obviously false, obstructive and contumacious as to constitute contempt." (R. 150).

In the District Court, government counsel said:

> "* * * the whole proposition here is a very simple one. Miss Howard has accumulated some $18,000.00 that she said she received from one Jack Gregory in 1934 and deposited it in her bank accounts beginning in 1944 and at various and sundry times thereafter. That is the statement that the Grand Jury does not believe and wants Miss Howard to tell them where she got that $18,000.00. Now, that is the crux of the whole proposition. * * *" (R. 32).

There, the Judge of the District Court said:

> "* * * I am aware of the fact, of course, that if the court finds the respondent has not told the truth, that there is no alternative except to commit the respondent to jail for the life of the Grand Jury or until the respondent purges herself of the contempt." (R. 33).

The Judge of the District Court further said:

> "* * * I think the sole question in this case is where the money came from that very suddenly began to pour into the various banks. The only explanation we have is that of the respondent herself as it appears in the transcript. That, it seems to the Court, is clear and unequivocal, that it was obtained from Jack Gregory. * * *" (R. 129).

The Court of Appeals ruled:

> "We shall not detail in this opinion the testimony given by appellant. * * * The appellant was not obstreperous or insolent, nor did she refuse to answer questions. In our opinion, however, the District Court was justified in finding that, beyond a reasonable doubt, her answers were evasive, fantastic and untrue and that their effect and purpose was to obstruct the inquiry of the Grand Jury." (R. 148).

It was and is the contention of petitioner:

1. That the only obstruction, if any, in the testimony of petitioner given before said Grand Jury was the "necessarily inherent obstructive effect" of alleged "false swearing" and that the false swearing or perjury alleged in the case at bar was not proved.

2. That petitioner's testimony before said Grand Jury[1] was not contumacious, obstreperous, evasive or unresponsive but, quite to the contrary, was courteous, direct and responsive.

The determinative portion of the judgment *nisi* (R. 16) reads:

> "It is, Therefore, ORDERED, ADJUDGED and DECREED that the said respondent, Blanch A. Howard, be committed to the custody of the United States Marshal and by him held until said respondent requests to be returned to the said Grand Jury and truthfully tell the Grand Jury where or from whom she acquired this seventeen or eighteen thousand dollars which she falsely testified before the Grand Jury she received from Jack Gregory or until further order of this Court."

Petitioner duly filed in the District Court her motion for new trial or, in the alternative, for a judgment of acquittal (R. 18-20), and motion to vacate and set aside the judgment (R. 23-25). These motions were overruled (R. 22-23, 25).

The dissenting opinion in the Court of Appeals (R. 152) reads in part:

> "Obviously, the presentment was laboriously prepared with a view to escaping the rule announced by the Supreme Court in *Ex Parte Hudgings*, 249 U. S.

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[1]R. pp. 56, 57, 58, 61, 62, 63, 79, 80, 81, 92 and 93 contain all of the testimony given by petitioner before said Grand Jury on the subject involved in the determinative portion of the judgment, *nisi*.

378, and *In Re Michael*, 326 U. S. 224, which is that a witness may not be punished for contempt for perjury alone under section 268 of the Judicial Code, and that there 'must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty.' The only element of obstruction charged in the presentment and found by the court is the alleged perjury of respondent in her testimony concerning the identity of the person from whom she received the seventeen or eighteen thousand dollars. In its finding the court followed the pattern set and borrowed the descriptive language used by the Grand Jury in the presentment. I think the effort to escape the rule in the Hudgings and Michael cases is as futile as it is obvious. I dissent."

II. Basis of Jurisdiction.

Jurisdiction is invoked under Act of June 25, 1948, c. 646; 62 Stat. 928; 28 USCA 1254 (1). The opinion and judgment of the Court of Appeals for the Eighth Circuit was entered June 16, 1950 (R. 138, 153). On July 7, 1950, the further enforcement of the judgment of the Court of Appeals was stayed by an order of Honorable Hugo L. Black, Associate Justice of this Court, pending petitioner's application herein for a Writ of Certiorari. The stay order was conditioned, in part, upon the filing of said petition by July 16, 1950.

III. Questions Presented.

1. May a witness who is found by a District Court to have testified falsely before a Grand Jury be lawfully adjudged guilty of contempt of court and placed in the custody of the United States Marshal until such time as the witness elects to testify truthfully?

2. Where there is no evidence of the obstruction of justice, other than that inherent in the alleged perjury itself, may a witness before a Grand Jury be lawfully adjudged in contempt of court on the sole ground that she committed perjury?

IV. Reasons for Granting the Writ.

In sustaining the judgment of the District Court, adjudging petitioner guilty of contempt of court and sentencing her as aforesaid, the Court of Appeals—

1. has, as to point 1 of the questions presented, *supra*, decided a federal question in a way probably in conflict with an applicable decision of this court, viz.:
Ex parte Hudgings, 249 U. S. 378.

2. has, as to point 2 of the questions presented, *supra*, decided a federal question in a way probably in conflict with an applicable decision of this court, viz.:
In re Michael, 326 U. S. 224.

3. has, as to point 2 of the questions presented, *supra*, rendered a decision in conflict with decisions of another United States Court of Appeals on the same matter, viz.:
United States v. *Goldstein*, 158 Fed. (2d) 916.
Blim v. *United States*, 68 Fed. (2d) 484.

Prayer.

For the foregoing reasons your petitioner prays that a Writ of Certiorari issue out of this court to the United States Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court, on a day to be designated, a full and complete transcript of the record and of all proceedings in the Court of Appeals had in this cause, to the end that this case may be reviewed and determined by this court; that on consideration thereof the judgment of the Court of Appeals be reversed and that your petitioner be granted such other and further relief as may be proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The judgment of the United States District Court for the Western District of Missouri, convicting the petitioner of civil contempt (R. 15-17), is not reported. The opinion of the United States Court of Appeals for the Eighth Circuit, affirming said judgment of said District Court (R. 138, 152) is not as yet officially reported.

II.

Jurisdiction of This Court.

Jurisdiction is invoked under Act of June 25, 1948, c. 646; 62 Stat. 928; 28 USCA 1254 (1). The opinion and judgment of the Court of Appeals for the Eighth Circuit was entered June 16, 1950 (R. 138, 153). On July 7, 1950, the further enforcement of the judgment of the Court of Appeals was stayed by an order of Honorable Hugo L. Black, Associate Justice of this Court, pending petitioner's application herein for a Writ of Certiorari. The stay order was conditioned, in part, upon the filing of said petition by July 16, 1950.

III.

Statement of the Case.

Petitioner seeks to review the judgment of the United States Court of Appeals for the Eighth Circuit, of June 16, 1950 (R. 152, 153), affirming the judgment and sentence of the United States District Court for the Western District

of Missouri of February 14, 1950 (R. 15-17), after a hearing before the Honorable Richard M. Duncan, District Judge.

The facts have been set forth in the foregoing petition (pp. 2-5) and will not be repeated.

IV.

Specification of Errors to Be Urged.

The United States Court of Appeals for the Eighth Circuit erred:

1. In ruling that petitioner, a witness who had been found by the District Court to have testified falsely before a Grand Jury, was lawfully adjudged guilty of contempt of court and committed to the custody of the United States Marshal until such time as she elects to testify truthfully.

2. In ruling that petitioner, whom the District Court found committed perjury before the Grand Jury, was lawfully adjudged guilty of contempt of court, there being no evidence of an obstruction of justice, other than that inherent in the alleged perjury itself.

ARGUMENT.

I.

The District Court exceeded its contempt power in adjudging that petitioner "be committed * * * until she requests to be returned * * * and truthfully tell * * * where or from whom she acquired this * * * (money) which she falsely testified * * * she received from Jack Gregory * * *" (R. 16) and the Court of Appeals erred in affirming the said judgment and order of commitment.

The attack upon the judgment and commitment, in the case at bar is direct, on appeal. In the case of *Ex parte Hudgings*, 249 U. S. 378, the attack upon the judgment and commitment there considered, was collateral, by *habeas corpus*. In the Hudgings case the trial court committed the alleged contemnor for "willfully refusing 'to answer certain questions truthfully' " and directed that the commitment should continue "until the petitioner had purged himself of the contempt."

In the Hudgings case this court said:

> "Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which in the opinion of the court would not be perjured.
>
> In view of the nature of the case, of the relation which the question it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which

might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore

Ordered that the petitioner be discharged."

In the case of *In Re Michael,* 326 U. S. 224, this court said:

"We granted certiorari to review this question, 324 U. S. 837, 65 S. Ct. 914, in view of the close similarity of the issues here to those decided in *Ex parte Hudgings,* 249 U. S. 378, 39 S. Ct. 337, 63 L. Ed. 656, 11 A. L. R. 333, *a case in which the District Court was held to have exceeded its contempt power.*" (Emphasis ours).

II.

The evidence is insufficient upon which to predicate the judgment of the District Court. The only evidence of an obstruction to the Court in the performance of its duty was that inherent in the alleged perjury itself. The Court of Appeals erred in affirming the judgment nisi on such insufficient evidence.

The majority opinion of the Court of Appeals expressly finds that petitioner "was not obstreperous or insolent, nor did she refuse to answer questions." (R. 148). The trial court, after having read the transcript of petitioner's testimony before the Grand Jury, stated that her explanation of where she obtained the money in question, seemed to the court to be "clear and unequivocal." (R. 129).

A reading of the record, we submit, will reveal that petitioner's testimony before the Grand Jury was courteous,

direct and responsive, and that the judgment for contempt (to paraphrase the Hudgings case) "* * * was (in the opinion of the court) imposed solely because * * * the witness was willfully refusing to testify truthfully, that is, was committing perjury."

At the outset of the hearing in the District Court, Government counsel stated that the "crux of the whole proposition" (R. 32), was petitioner's statement as to the source of the money in question, which the Grand Jury did not believe. The Honorable Richard M. Duncan, District Judge, also expressed his erroneous conception of the proceeding. He said:

> "If the court finds that respondent has not told the truth there is no alternative except to commit the respondent to jail * * * or until respondent purges herself of the contempt." (R. 33).

Before entering the judgment *nisi*, the District Judge called the petitioner before the bar and said, in part:

> "* * * on yesterday the court expressed the view of the court concerning the matter, that is, to the effect that you were guilty of obstructing the Grand Jury by making untruthful statements respecting matters within your knowledge." (R. 133).

The judgment entered (R. 16), clearly manifests the execution of this erroneous conception.

In the case of *In Re Michael*, 326 U. S. 224, this court said:

> "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth

from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses. It is in this sense, doubtless, that this Court spoke when it decided that *perjury alone does not constitute an 'obstruction' which justifies exertion of the contempt power* and that there 'must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty.' " (Emphasis ours).

The United States Court of Appeals for the 7th Circuit ruled in harmony with the *Michaels case, supra,* in *United States* v. *Goldstein,* 158 Fed. (2d) 916. In that case the court said:

"In the instant situation, there appears to be no escape from the idea that any interference with the judicial power of this court was only that 'inherent in the wrong of testifying falsely.' In other words, *the perjury alleged is not merely one of the aggravations of the contempt charged but is the basis or foundation therefor.*" (Emphasis ours).

Conclusion.

It is respectfully submitted that the dissenting opinion in the Court of Appeals (R. 151-152) contains a correct analysis of this cause on the record and that this petition for a Writ of Certiorari should be granted.

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